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No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CARGILL, INCORPORATED,
Petitioner

v.

CHARTER INTERNATIONAL OIL COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

In an effort to remove the bankruptcy court from involvement in undisputed matters, Congress enacted Section 363 of the Bankruptcy Code. 11 U.S.C. § 363(b)(1) provides that—

> The trustee,* after notice and a hearing,** . . . may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 363(m) of the Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

The questions presented are:

1. Whether § 363(m) is properly interpreted as rejecting decisions of this Court that a matter is moot only if circumstances make it impossible for the reviewing court to fashion judicial relief.

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* Section 1107 of the Code provides that:

> A debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee . . .

** Section 102 of the Code provides:

> *Rule of Construction*
>
> (1) "After notice and a hearing", or a similar phrase—
>
> * * * *
>
> (B) authorizes an act without an actual hearing if such notice is given properly and if—
>
> (i) such a hearing is not requested timely by a party in interest;

A. Whether 11 U.S.C. § 363(m) is meant to do anything more than eliminate *rescission* as a potential remedy in appealing an unstayed order authorizing sale of property of a bankruptcy estate.

B. Whether § 363(m) should be construed to apply to a purchaser who has negotiated in good faith a purchase of assets from the debtor-in-possession ("DIP") so that the purchaser must stay the sale to itself in order to preserve its right to establish on appeal that the excess of the sales proceeds (over the purchasers' original contract price) obtained in an unlawful auction should be refunded.

2. Whether, after the bankruptcy court has set a deadline in accordance with 11 U.S.C. § 102(1) for parties to ask to be heard with respect to actions that the DIP proposes to take in accordance with 11 U.S.C. § 363(b), and no party in interest has requested a hearing by the deadline or thereafter, the bankruptcy court *sua sponte* can conduct an unnoticed auction and require the DIP to act in accordance with the auction rather than in the manner identified in the notice.

3. Whether the actions which a bankruptcy judge can take under 11 U.S.C. § 363(b) are limited to approving or disapproving a proposed action of the DIP and whether that limited role is to be undertaken only when a party in interest has requested to be heard with respect to the proposed action.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 13a) is reported at 829 F.2d 1054. Its order denying rehearing and rehearing en banc (App. 20a) is not officially reported.

The opinion of the District Court (App. 10a) and the order of the Bankruptcy Court (App. 4a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1987 (App. 18a). A timely petition for rehearing and rehearing en banc was denied on November

24, 1987 (App. 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Bankruptcy Reform Act of 1978, §§ 102(1), 363(b), 363(m), and 1109 as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (11 U.S.C. §§ 102(1), 363(b), 363(m), and 1109) are set out in the appendix (App. 22a-23a).

STATEMENT

On April 20, 1984, The Charter Company, Charter International Oil Company ("CIOC"), and approximately 40 other affiliates of The Charter Company filed petitions for reorganization under The Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division (the "bankruptcy court"). No bankruptcy filing was made on behalf of approximately 90 other affiliates of The Charter Company, including Northeast Petroleum Industries, Inc. ("NPI"), a wholly owned subsidiary of CIOC, and Northeast Petroleum Corporation ("NPC"), a subsidiary of NPI, which was engaged in a multi-state oil distribution business. CIOC remained a debtor-in-possession.

In early 1985, CIOC determined that it should sell NPC as a going concern. To assist in identifying qualified buyers capable of negotiating and closing the complex transaction promptly, NPC engaged Allen & Company ("Allen"), a broker of oil industry assets. CIOC had also engaged Allen to market CIOC's Houston refining business, which was an asset of the CIOC bankruptcy estate. Allen conducted a seven-month marketing program for the NPC assets, in which it communicated with over 160 entities which it felt, on the basis of its experience, might have an interest in NPC, including Atlantic Petroleum Corporation ("Atlantic"). The search culmi-

nated in a sealed bidding process, to which Atlantic did not respond.

In October 1985, the petitioner Cargill, Incorporated ("Cargill") submitted the highest sealed bid for the NPC assets, a bid of approximately $107,000,000. Thereafter, Cargill negotiated a detailed asset purchase agreement with NPC, expending more than $600,000 in the process of due diligence and negotiations. On December 16, 1985, NPC and Cargill executed a contract for the sale of the NPC assets (the "NPC-Cargill Contract").

The NPC-Cargill Contract is a lengthy document specifying the details of a complex transaction that involves many prospective commitments, including a three-year supply agreement and a service agreement between the parties and certain Charter affiliates. The NPC-Cargill Contract provided that Cargill had the right to match any higher offer for the NPC assets within five days of notice to Cargill of such an offer (App. 5a).

On December 26, 1985, CIOC, NPC's second-tier corporate parent, moved the bankruptcy court to authorize CIOC to consent to the proposed sale of NPC's assets to Cargill (the "CIOC Motion"). The following day, the bankruptcy court entered a scheduling order establishing January 14, 1986, as the deadline for submission to CIOC of any "higher and better offers" and also fixing the deadline on the same date for filing with the Court objections to the proposed sale (the "Scheduling Order", App. at 1a). The Scheduling Order set a January 17, 1986 hearing to consider objections, if any were filed by the January 14 deadline (App. 2a). The notice of the proposed sale of NPC assets to Cargill was published in a number of national newspapers and mailed to all persons entitled to or requesting notice of hearings in the Charter cases. No objections to the CIOC Motion were filed either by the January 14 deadline or thereafter.

At the January 17 hearing, purporting to act on the CIOC motion, and in disregard of the January 14 deadline in the Scheduling Order and the precisely worded 11 U.S.C. § 363(b),[1] the bankruptcy court called for oral bids for the NPC assets—assets of a nondebtor in bankruptcy. Atlantic, an entity with no standing in the CIOC bankruptcy case, orally offered a higher amount than the amount provided in the NPC-Cargill Contract, which was the subject of the motion before the bankruptcy court. Over the objections of both Cargill and CIOC, Cargill was forced into competitive bidding against Atlantic, competitive bidding for which Cargill was wholly unprepared. The court did not identify the authority on which it relied in auctioning assets (including complex prospective contractual relationships) belonging to a nondebtor. At the end of the January 17 hearing, the bankruptcy court orally ordered CIOC to sell the NPC assets to Atlantic.

On January 19, Cargill moved to reopen the hearing, arguing that Cargill's closing bid on January 17 was, in fact, the high bid[2] and asserting Cargill's contractual right of first refusal. On January 27, 1986, the court, purporting to grant Cargill's motion, reopened bidding. Again, over Cargill's objection, the court renewed its auction of the NPC assets. The court again ignored the fact that the NPC assets (1) were not part of the bankruptcy estate, and (2) were the subject of an asset purchase agreement to which no party in interest had objected. Having no practical alternative, Cargill outbid

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[1] 11 U.S.C. § 363(b) is one of several sections in the Bankruptcy Reform Act of 1978 that precludes any involvement of the bankruptcy judge in the absence of an objection by a proper party. *See* Section II of Reasons for Granting the Writ, *infra*, pp. 14-19.

[2] Atlantic's bid on its face was $53,000 higher than Cargill's (App. 7a) but this failed to account for NPC's obligation to reimburse Cargill for the $600,000 in expenses which it had incurred in its due diligence and contract negotiation.

Atlantic. At the conclusion of the bidding, the bankruptcy court ruled that it would authorize CIOC to consent to have NPC sell its assets to Cargill at a price approximately $5,000,000 above the NPC-Cargill Contract price (the "Excess Purchase Price").

The bankruptcy court entered an order reflecting the ruling from the January 27, 1986 hearing on February 3, 1986 (the "Authorization Order", App. 4a). That Order noted that Cargill had engaged in the bidding over its objection and had reserved all rights (App. 7a). On February 6, 1986, Cargill purchased the NPC assets. Thereafter, it pursued this appeal to establish its right to a refund of the Excess Purchase Price.[3]

Cargill appealed to the District Court for the Middle District of Florida, Jacksonville Division (the "district court"), which dismissed the appeal. The district court held that the bankruptcy court had jurisdiction to sell the assets of a nondebtor. Cargill briefed the question of the limited role of the bankruptcy court under 11 U.S.C. §§ 102(1) and 363(b), but the district court did not address these issues. Without explanation, the district court stated that such an auction was within the "core" jurisdiction of the bankruptcy court as detailed in 11 U.S.C. § 157(b)(2) (App. 11a).

Cargill then appealed to the court below. Although the court below strongly suggested in a footnote that Cargill's appeal of the substantive issues was well taken (App. 15a, n.1), it dismissed the appeal as moot because Cargill did not stay the sale of the NPC assets to itself

[3] Cargill filed a proof of administrative claim in the consolidated Charter bankruptcy proceedings, seeking a refund of the Excess Purchase Price. CIOC filed an objection to Cargill's administrative claim, and Cargill filed an answer to CIOC's objection. The court granted Cargill's motion to stay the determination of CIOC's objection pending its appeal. Cargill's claim is entitled to an administrative priority, if it is allowed. Under Charter's proposed Plan of Reorganization, the reorganized debtor is obligated to pay all administrative claims in full when they are finally allowed.

pending the appeal (App. 17a). The court below relied upon 11 U.S.C. § 363(m) in reaching this conclusion (App. 16a). A timely petition for rehearing and suggestion of rehearing *en banc* was denied without opinion by the court below on November 24, 1987 (App. 20a).

REASONS FOR GRANTING THE WRIT

I. The Interpretation of 11 U.S.C. § 363(m) in the Decision Below Is Not Consistent with Prior Decisions of This Court. It Creates a Conflict of Authority among Appellate Courts, and Defeats the Basic Intention of That Section.

Because of its misreading of 11 U.S.C. § 363(m), the court below denied relief to the very class of persons which that section was meant to protect—good faith purchasers of bankruptcy related assets. If left uncorrected, it will confirm the perception that orderly dealings with Chapter 11 debtors or bankruptcy trustees are unlikely. In virtually all cases where a bankruptcy court exceeds its limited role in sales of estate property, discussed in Section II, *infra*, pp. 14-19, the decision below would shield such actions from review.

A. *11 U.S.C. § 363(m) Was Intended to Protect Good Faith Purchasers, Not to Strip Them of Remedies when Bankruptcy Courts Ignore Their Rights.*

11 U.S.C. § 363(m) applies only to sales of property of the estate and by its very terms affects only "the validity of a sale." The statute provides:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

On appeal, Cargill has not attacked the validity of a sale. Cargill outbid Atlantic in the unlawful auction conducted by the bankruptcy court, recognizing that this was the only practical way to preserve its rights. Cargill's appeal was the only procedure available to establish and implement its right to refund of the Excess Purchase Price.

Section 363(m) is the codification of former Bankruptcy Rule 805, portions of which are now also included in Bankruptcy Rule 8005. Bankruptcy Rule 8005 advisory committee's note. However, "[t]he rule that failure to obtain a stay pending appeal renders the issue moot did not originate with the Bankruptcy Rules. Rather, it is a judicial doctrine which developed from the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot. . . ." *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985). Rule 805, and therefore § 363(m), is "merely declaratory" of this judicial doctrine. *Id. See also* Bankruptcy Rule 805 advisory committee's note; *A & H Holding Corp. v. O'Donnell (In re Abingdon Realty Corp.)*, 530 F.2d 588 (4th Cir. 1976).

The decision below ignored this history and denied effective relief to Cargill for refund of the Excess Purchase Price, thus significantly broadening the application of § 363(m). Prior to this decision, no court had invoked § 363(m) to deny appellate review to a *successful* purchaser of bankruptcy related assets who sought relief other than rescission of the sale. In fact, in a substantially identical factual pattern before the Seventh Circuit, the applicability of § 363(m) was not even raised. *In re Chung King, Inc.*, 753 F.2d 547 (7th Cir. 1985). *Chung King* involved an appeal by a successful purchaser of property of the estate who sought to reverse the bankruptcy court's reopening of the bidding process after appellant's bid had been confirmed. On appeal, the purchaser, who had not stayed the sale to himself, sought

enforcement of the confirmed bid price. 753 F.2d at 548. The Seventh Circuit recognized the appellant's right to enforce his contractual price. 753 F.2d at 554. In *Chung King*, there was no suggestion that enforcing the contractual rights of the good faith purchaser "affected the validity" of the sale.

This Court should grant this petition because (1) the decision below is so sweeping in its broad application, because (2) the result of that decision means that the underlying question here, though frequently recurring—"capable of repetition yet evading review"—will remain without review by an article III court,[4] and because (3)

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[4] In the past year, there have been at least two other appellate decisions reading the mootness provisions of the Bankruptcy Code overbroadly. 11 U.S.C. § 364(e) also derives from Bankruptcy Rules 805 and 8005. Bankruptcy courts are adding to the narrowly delineated transactions which can be shielded from appellate review under § 364(e), if the transactions are not stayed. This process of amending the Bankruptcy Code by bankruptcy court order is being accepted by reviewing courts. *See Unsecured Creditors' Comm. v. First Nat'l Bank & Trust Co. (In re Ellingsen MacLean Oil Co.)*, 834 F.2d 599 (6th Cir. 1987), *reh'g denied* (January 15, 1988) (§ 364(e) held to prevent an appeal of the bankruptcy court's reliance upon § 364(c) to "settle all controversies regarding the validity" of the secured creditor's pre-petition security interests with respect to more than $3 million of debt, when the unsecured creditors' committee failed to stay a post-petition loan of $60,000 and the issuance of certain letters of credit); *Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484 (9th Cir. 1987) (bankruptcy court authorized debtor's receipt of loan which the bank had conditioned upon a cross-collateralization of its pre-petition debt with its post-petition debt and denied a stay of the authorization order sought by unsecured creditors; held § 364(e) rendered appeal of unsecured creditors of the cross-collateralization of pre-petition debt moot). These overbroad readings of the stay provisions in §§ 363(m) and 364(e) are destroying innocent parties' legal rights and their ability to preserve such rights through appeal. Parties are forced to resort to extraordinary writs to keep their rights under the Bankruptcy Code from being effectively repealed by quickly executed orders. *In re First S. Sav. Ass'n*, 820 F.2d 700 (5th Cir. 1987). This Court should direct

of the significant harm which the decision below will cause to the bankruptcy system in deterring potential good faith purchasers from considering bankruptcy-related assets.

The cases cited in the decision below involve the typical situation where an *unsuccessful* bidder appeals the sale of property to *a third party* without staying the sale. *See Bleaufontaine, Inc. v. Roland Int'l. (In re Bleaufontaine)*, 634 F.2d 1383 (5th Cir. 1981); *Hoese Corp. v. Vetter Corp. (In re Vetter Corp.)*, 724 F.2d 52 (7th Cir. 1983). In these situations, § 363(m) protects the third party. In this case, there is no third party whose title would be disturbed. The appellant below, Cargill, is the purchaser, the entity which was meant to receive the protection of § 363(m). Cargill does not seek rescission of the sale, but merely a recognition of its damages caused by the interference of the bankruptcy court with Cargill's right—after no party in interest objected—to purchase the assets at the contract price.

Invoking § 363(m) to defeat Cargill's appeal undermines the objective of § 363(m). If the decision below is not corrected, potential purchasers will lower their "final" bids, anticipating departure from proper procedures by bankruptcy courts, such as the Scheduling Order in this case. Under the decision below, such departures will be unreviewable by article III courts, unless the purchaser successfully goes through the odd process of persuading the bankruptcy court to stay the sale to itself, thus preventing the estate from transforming assets into cash, pending appeal.[5]

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reviewing article III courts not to expand the category of moot issues beyond those specifically identified in 11 U.S.C. §§ 363(m) and 364(e), as urged by Judge Merritt in his dissent in *Ellingsen MacLean Oil*, 834 F.2d at 607.

[5] The purchaser must actually obtain the stay—not merely request it. *See Key Bank N.A. v. Internal Rev. Serv. (In re Lake*

To insulate the extrajurisdictional actions by bankruptcy judges from review by article III courts is a dangerous abdication of the special reviewing role that Congress necessarily has assigned to district courts and courts of appeals in establishing bankruptcy judges as a "unit of the district court." 28 U.S.C. § 151. *Northern Pipeline Constr. Co. v. Marathon Pipeline*, 458 U.S. 50 (1982), would seem to require the narrowest, rather than the broadest, application of mootness principles in order to assure appropriate oversight by appellate courts of determinations by bankruptcy courts of their own jurisdiction.

B. *The Decision Below Represents an Unintended and Unreasonable Extension of 11 U.S.C. § 363(m).*

The decision below precludes any direct appeal by a party to a sale in which the bankruptcy court was involved (no matter how inappropriate the involvement of the bankruptcy court might have been), unless the sale is stayed (no matter how useless that stay might have been). In this case, Cargill has been seeking through direct appeal (as it must to avoid issues of collateral estoppel, or law of the case) to establish two points. *First*, by negotiating in good faith and executing the NPC-Cargill Contract, Cargill gained a contractual interest in the NPC assets, i.e., in the absence of a valid objection by a party in interest, the right to purchase the NPC assets at the price provided in the NPC-Cargill Contract. *Second*, the extrajurisdictional interference of the bankruptcy court with that contractual interest resulted in an unjust enrichment to the bankruptcy estate and

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Placid Co.), 78 Bankr. 131 (W.D. Va. 1987); *see also Burchinal v. Central Washington Bank*, 829 F.2d 1484 (9th Cir. 1987 (discussing § 364(e)). A bankruptcy court will no incentive to grant the stay because a denial of the stay will not only ensure immediate cash to the estate but it will also insulate the bidding procedures from appellate review.

gave rise to a right of Cargill to a refund of the Excess Purchase Price.

The major shortcoming of the decision below is its failure to recognize the claim that Cargill has pending before the bankruptcy court. That claim is not for rescission; it is for the damages that Cargill suffered through unjust enrichment of the estate because of the bankruptcy court's unlawful auction. The appropriate procedure for establishing the absence of any authority in the bankruptcy court to conduct the auction which forced Cargill to ransom its contractual interest in the NPC assets is a direct appeal from the Authorization Order which enforced that auction. Under general federal principles of mootness, which 11 U.S.C. § 363(m) codifies, Cargill's appeal is not moot, for it is clear that a properly justiciable issue remains.

The appropriate standard for mootness was enunciated by this court in *Mills v. Green*, 159 U.S. 651, 653 (1895), "[W]hen, pending an appeal from the judgment of a lower court, and without any default of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the Plaintiff, to grant him *any effectual relief whatever*, the court will not proceed to a formal judgment, but will dismiss the appeal." (Emphasis added.) Section 363(m) does not supplant this common law standard of mootness. The statute eliminates merely one category of effective judicial relief, the rescission of sales to good faith purchasers.

The procedural posture of Cargill is substantially identical to that of the petitioner in *Bank of Marin v. England*, 385 U.S. 99 (1966). In *Bank of Marin*, this Court rejected the bankruptcy trustee's argument that the appeal of a bank was moot because the bank's co-defendant on the turnover complaint by the trustee—the payee of a prepetition check cashed after the debtor's bankruptcy—had paid the trustee. This Court held that the pend-

ing cross-claim for contribution by the payee against the bank provided a sufficient controversy to defeat the trustee's mootness claim. The determination of the legal issues in the bank's certiorari petition was essential to the bank's defense of the payee's cross-claim. In the case at bar, Cargill's pending proof of claim can only be resolved when the questions raised in this petition are given substantive answers.

Neither the precise wording of 11 U.S.C. § 363(m) nor its legislative history reveals any intention of Congress to alter the result in *Bank of Marin*. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. . . . The Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 501 (1986).

Likewise, in *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986), the Court of Appeals recognized that the unavailability of certain forms of relief because of intervening circumstances did not automatically eliminate the possibility for other effective relief. The Ninth Circuit in *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179 (9th Cir. 1977), agreed. *Combined Metals* involved an appeal from the confirmation order of a Chapter 10 reorganization plan and various court orders for asset liquidation. The trustee moved to dismiss the appeal as moot. The court held that the appellant's failure to obtain a stay rendered review of the asset sales moot. However, the court ruled that because the appeal of the confirmation order would affect the actions of the trustee and control the distribution of proceeds, matters still the subject of litigation in the bankruptcy court, it was not moot.[6]

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[6] Indeed, the court below had previously recognized that appeals of bankruptcy asset sales could be "partially moot" because the

Because of the existence of Cargill's administrative claim, the courts below can and should be directed to provide effective judicial relief for Cargill. An appellate decision as to the total absence of authority of the bankruptcy court to conduct an auction, discussed *infra*, pp. 14-19, will determine the validity of Cargill's administrative claim. "[Rule 805] does not, of course, bar appeal where the appellant seeks relief vis-a-vis the debtor *other than the third party*. Thus, for example, if [the appellant] had asserted a claim against [the debtor] for damages resulting from breach . . . , this appeal would not now be moot because if this court reversed the decision below effective relief could be ordered in the form of damages to be paid by [the debtor]." *American Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245 (5th Cir. 1980) (emphasis supplied). By ignoring Cargill's administrative claim, the court below interpreted § 363(m) overbroadly, in derogation of the common law codified by that section. The result conflicts with the decision of this Court in *Bank of Marin*, and the decisions of the District of Columbia and the Ninth circuits in *In re AOV* and *Combined Metals* respectively.

Section 363(m) "enable[s] the bankruptcy court to promise the purchaser that it will get a good title and thus reduce the risk the purchaser must assume. . . . A reduction in risk leads to higher bids, to the benefit of the bankrupt estate." *Seaboard Sys. R.R., Inc. v. United States (In re Chicago, Milwaukee, St. Paul and Pac. R.R. Co.)*, 799 F.2d 317, at 330 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2460 (1987). The decision below, however, warns potential good faith purchasers that good faith negotiations with the DIP conducted in complete compliance with established procedures can be ignored by the

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transaction closed pending appeal, but that questions collateral to the sale were still appropriately reviewable. *Markstein v. Massey Assocs., Ltd.*, 763 F.2d 1325 (11th Cir. 1985). The court below here declined to follow its prior decision.

bankruptcy court with impunity. Such a judicial environment will not lead to constructive negotiations and the highest and best offers to future bankruptcy estates.

II. The Actions of the Bankruptcy Court, Affirmed by the District Court, Resurrect Procedures Which Congress Explicitly Changed Because They Involved the Bankruptcy Judge in Managerial Rather Than Judicial Duties.

The actions of the bankruptcy judge in this case are a continuation of procedures long used in a system that Congress sought to reform in 1978. In adopting the bankruptcy code, Congress had as one of its main objectives the revision of the duties of the bankruptcy judge so that he would function as a judge, not an administrator. Congress recognized that under the Bankruptcy Act, as last significantly amended in 1938, a bankruptcy judge's "statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum". H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 4 (1978).

The legislative history of the Bankruptcy Reform Act of 1978 is explicit on the intention of Congress to limit the role of the bankruptcy judge generally to the resolution of disputed matters. On July 14, 1978, the Committee on the Judiciary reported on Senate Bill 2266, which included what became 11 U.S.C. § 102(1), as follows:

> Paragraph (1) defines the concept of "after notice and a hearing". *The concept is central to the bill and to the separation of administrative and judicial functions of bankruptcy judges.* The phrase means after such notice as is appropriate in the particular circumstances (to be prescribed by either the Rules of Bankruptcy Procedure or *by the court in individual circumstances that the Rules do not cover . . .*), and such opportunity for a hearing as is appropriate in the particular circumstances. Thus, a hearing will not be necessary in every instance. If there is

> no objection to the proposed action, the action may go ahead without court action. *This is a significant change from present law*, which requires the affirmative approval of the bankruptcy judge for almost every action. The change will permit *the bankruptcy judge to stay removed from the administration of the . . . reorganization case, and to become involved only when there is a dispute* about a proposed action, that is, only when there is an objection.

S. Rep. No. 95-989, 95th Cong., 2d Sess., 27-28 (1978) (emphasis added). The conferees on bankruptcy legislation specifically noted:

> [T]he phrase "on request of a party in interest" or a similar phrase is used in connection with an action that the court may take in various sections of the code. *The phrase is intended to restrict the Court from acting sua sponte.*

124 Cong. Rec. 33,993 (1978) (statement of Sen. DeConcini); 124 Cong. Rec. 32,393 (1978) (statement of Rep. Edwards (emphasis added). *See also* Novellino, *After Notice and Hearing*, 55 Am. Bankr. L.J. 293 (1981). The Bankruptcy Reform Act of 1978 became law on October 31, 1978. Congress set the effective date as October 1, 1979 to allow an orderly transition from the old procedures to the new system.

Thus, the Congressional intention and action to eliminate bankruptcy court involvement in unopposed proposals of a DIP is clear. Yet in this case, more than eight years after the passage of the Bankruptcy Reform Act of 1978, the bankruptcy judge below viewed himself as empowered, at a time when there was no dispute before him, to engage in managerial duties, by conducting an auction of complex assets of a DIP subsidiary, involving as well, the right to supply affiliates of the DIP for three years. With the exception of the Scheduling Order, which it ignored, the bankruptcy court evinced no awareness of the Congressional revision of the role of bankruptcy

courts in 1978. This is typical of the approach of many bankruptcy courts; long after the effective date of the Bankruptcy Code, bankruptcy courts are asked for "comfort orders" on § 363(b) transactions. See *In re Robert L. Hallamore Corp.*, 40 Bankr. 181 (Bankr. D. Mass. 1984). The decision below is important because it fails to provide proper guidance to the bankruptcy courts with respect to the "notice and a hearing" concept.[7]

Even without the explicit legislative history, the language of 11 U.S.C. § 363(b) is easily parsed. This provision uses the notice and a hearing concept in establishing the authority of a trustee or DIP to "use, sell, or lease" property of the estate outside the ordinary course of business. The bankruptcy court's power to act—either to approve or disapprove a proposed use of property by the trustee or DIP—arises only if a party in interest has filed a timely objection.

If there is such an objection, the role of the bankruptcy court is limited to the consideration of any timely objections which have been filed. If no timely objections have been filed, then, by its explicit terms, § 102(1)(B) "authorizes an act without an actual hearing." Thus, in such a situation, which was the situation in this case, the bankruptcy judge is *functus officio*. There is no role that he is authorized to play. And this was clearly intended by Congress. Nothing in the Bankruptcy Code permits the bankruptcy court to structure an alternative transaction. Congress granted the authority to "use, sell, or lease" the property of the estate to the trustee or DIP, *not* to the bankruptcy court. The power of the bankruptcy court was limited to determining the validity of an objection timely filed by a party in interest.

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[7] Under the earlier Bankruptcy Act, the standard procedure had been for the bankruptcy court to enter an order confirming a sale. Many bankruptcy courts continue this practice under the 1978 Act. Because they generally file orders and not opinions, the pervasiveness of this practice cannot be demonstrated through citations.

As the Congressional history clearly states, the drafters of the Code chose their words carefully to implement a "central concept" of the reform of the bankruptcy system, i.e., the judge as judicial officer, not as superdirector of the DIP. When Congress intended the bankruptcy court to consider a matter, even in the absence of an objection, it said so. *See, e.g.*, 11 U.S.C. §§ 364(b), (c), and (d), and 1128(a). Until the bankruptcy court commenced its auction on January 17, the parties in this case proceeded with the complex transaction in a manner designed to obtain the highest price through a negotiated disposition of the assets of a going concern.

After a nationwide bidding process conducted by Allen, Cargill emerged as the highest bidder for the NPC assets. NPC deemed the shareholder consent from CIOC, a second tier parent of NPC and a Chapter 11 debtor, necessary to authorize it to close the transaction. Accordingly, the CIOC Motion sought authorization under 11 U.S.C. § 363(b) to use CIOC's control of NPI to cause NPI to consent to the sale.

Upon the filing of the CIOC Motion, the bankruptcy court exercised its appropriate powers by issuing the Scheduling Order,[8] specifically designating January 14, 1986, as the date by which any objections were to be filed in writing with the court and served on the parties in interest (App. 2a). Consistent with the "after notice and a hearing" concept, the Scheduling Order set forth numerous provisions requiring CIOC to notify all parties in interest of the CIOC Motion (App. 2a). CIOC fulfilled all the notice requirements contained in the Scheduling Order.

By the close of business on January 14, 1986, no objections to the CIOC Motion had been filed. Consequently,

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[8] The Scheduling Order implemented the Congressional intent that appropriate notice "be prescribed . . . by the court in individual circumstances that the Rules do not cover . . .". S. Rep. No. 95-989, 95th Cong., 2d Sess., 27 (1978), quoted more fully *supra*, at p. 14.

as a bankruptcy court matter under § 363(b), the role of the court was at an end. The "after notice and a hearing" requirements were fulfilled by the Scheduling Order, and the absence of objections left no dispute for the court to resolve. There was no "case or controversy" before the bankruptcy court.

Under the guise of holding the January 17 hearing for which there was now no purpose or authority, the bankruptcy court, *sua sponte*, opened the court to bidding on the NPC assets. Atlantic, an entity that was not a creditor in the CIOC case, and consequently not a party in interest with standing to object to the CIOC Motion,[9] orally put forth a bid for the NPC assets. Cargill, objecting to the bankruptcy court's contravention of its Scheduling Order, and left with no other practical alternative, bid against Atlantic, in an attempt to protect its contractual rights.

The district court affirmed the bankruptcy court's actions in a casual manner, failing to address the § 363(b) issue, and the intention of Congress clearly expressed in the Conference Report that the provision for action "on request of a party in interest"—which Atlantic was not —was "intended to restrict the Court from acting *sua sponte*." 124 Cong. Rec. 33,993 (1978). The issue evaded review in the decision below because of the misinterpretation of § 363(m).

This case has got to this point because the bankruptcy court below failed to comprehend that there was no issue before it, and that it was not authorized to conduct an auction. Many bankruptcy courts (and reviewing article III courts) have yet to understand and to implement the

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[9] 11 U.S.C. § 1109(b) delineates those parties with standing in Chapter 11 cases:

> (b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

significant restructuring of the bankruptcy court role made by Congress in 1978. Thus, this Court should decide this case on the merits so as to assist in realizing finally the 1978 Congressional goal of establishing bankruptcy courts as forums which act judicially, not managerially.

CONCLUSION

The courts below first failed to implement the intent of Congress to remove bankruptcy courts from uncontested sales. That error was compounded by the erroneous assumption that 11 U.S.C. § 363(m) overturned prior decisions of this Court. This case thus presents two important and recurring questions of bankruptcy practice that, in the interest of sound administration in the bankruptcy courts, merit this Court's attention and clarification.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY, 1988

APPENDIX

APPENDIX

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case Nos. 84-289-BK-J-GP through
84-332-BK-J-GP, inclusive, and
85-1033-BK-J-GP

IN RE: THE CHARTER COMPANY, *et al.*,
Debtors.

ORDER SCHEDULING HEARING TO CONSIDER MOTION FOR ORDER AUTHORIZING CHARTER INTERNATIONAL OIL COMPANY TO CONSENT TO AND CAUSE SALE OF ASSETS BY INDIRECT, NON-DEBTOR SUBSIDIARY

Charter International Oil Company ("CIOC"), debtor and debtor in possession, having moved this Court by motion dated December 26, 1985 (the "Motion"), for an order scheduling a hearing to consider the authorization of CIOC to consent to and cause the sale of the NPC Assets to Cargill (as described in the Motion) and no adverse interest appearing; and no notice hereof being required; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that:

1. January 17, 1986, at 8:00 A.M., or as soon thereafter as counsel can be heard, be, and it hereby is, fixed as the date and time for a hearing to be held before this Court (the "Hearing") to consider the Motion.

2. Pursuant to Bankruptcy Rules 2002(k) and (1), notice of the Hearing and of the other dates fixed herein, in substantially the form of that attached to the Motion as Exhibit B, shall be deemed adequate and sufficient if:

(a) served by CIOC on or before December 27, 1985, by regular mail upon:

(i) all persons that have requested notice of the hearings conducted in these chapter 11 cases,

(ii) each of the functioning committees appointed by this Court, by service upon their respective counsel, and

(iii) each person who, as of the date hereof, has filed a proof of claim with this Court against CIOC, or who has been listed in the schedules of liabilities filed by CIOC as holding a claim against CIOC; and

(b) published in:

(i) The Wall Street Journal (National Edition),

(ii) The New York Times (National Edition),

(iii) The Florida Times/Union, and

(iv) The Boston Globe,

one (1) time each, on or before January 7, 1986.

3. Each Competitive Bid (as defined in the Motion) shall be made in writing and shall be served upon CIOC and its attorney's on or before January 14, 1986, and:

(a) shall be on the same terms and conditions provided in the Agreement;

(b) shall be accompanied by current audited financial statements of the proposed offeror, or if

the offeror is an entity formed for the purpose of acquiring the NPC Assets, current audited financial statements of the shareholders of the offeror, which must demonstrate the financial capacity of the offeror to consummate the transaction; and

(c) if the Competitive Bid is premised upon financing, written evidence of a commitment for such financing must be included; and

4. Pursuant to Bankruptcy Rule 2002(1), January 14, 1986, at 5:00 p.m. be, and it hereby is, fixed as the time by which objections, if any, to the sale of the NPC Assets to Cargill shall be filed with this Court and served, by hand or by Federal Express, upon: (a) Levin & Weintraub & Crames, 225 Broadway, New York, New York 10007, Attention: Myron Trepper, Esq., (b) Smith & Hulsey, 500 Barnett Bank Building, Jacksonville, Florida 32202, Attention: Stephen D. Busey, Esq., (c) Kramer, Levin, Nessen, Kamin & Frankel, 919 Third Avenue, New York, New York 10022, Attention: Joel B. Zweibel, Esq., (d) Stroock & Stroock & Lavan, 7 Hanover Square, New York, New York 10004. Attention: Jack Gross, Esq., and (e) Adelman Lavine Krasny Gold & Levin, Suite 1900, 2 Penn Center Plaza, Philadelphia, Pennsylvania 19102, Attention: Robert Levin, Esq. All such objections shall set forth with particularity the basis therefor.

5. CIOC be, and it hereby is, authorized and empowered to take such steps and do such things as may be necessary or appropriate to fulfill the requirements established by this order.

Dated: December 27, 1985
Jacksonville, Florida

/s/ George L. Proctor
GEORGE L. PROCTOR
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case Nos. 84-289-BK-J-GP through
84-332-BK-J-GP, inclusive, and
85-1033-BK-J-GP

IN RE: THE CHARTER COMPANY, *et al.*,
Debtors.

[Filed Feb. 3, 1986]

ORDER AUTHORIZING
CHARTER INTERNATIONAL OIL COMPANY
TO CONSENT TO AND CAUSE SALE OF ASSETS
BY INDIRECT, NON-DEBTOR SUBSIDIARY

This cause came to be heard on the motion of Charter International Oil Company ("CIOC"), debtor and debtor in possession, dated December 27, 1985 (the "CIOC Motion"), for an order authorizing CIOC to consent to and cause the sale of substantially all of the assets of Northeast Petroleum Corporation ("NPC") (the "NPC Assets") to Cargill, Incorporated ("Cargill") pursuant to an Assets Purchase Agreement dated December 16, 1985 (the "Agreement"); and due and timely notice of the hearing on the CIOC Motion having been given; and a hearing having been held before this Court on January 17, 1986, to consider the CIOC Motion; and Cargill having moved this Court to reopen the hearing; and the hearing having been reopened after due consideration of memoranda filed and arguments of counsel and held before this Court on January 27, 1986, after due and

timely notice thereof; and after considering competitive bids made for the NPC Assets at the January 17 and January 27 hearings; and upon the record made before me at such hearings, the Court makes the following findings of fact:

Findings of Fact

1. In March, 1985, NPC, in conjunction with CIOC, engaged Allen & Company, Incorporated ("Allen") to conduct an extensive marketing effort to sell the NPC Assets, including the identification of prospective purchasers, the circulation of an offering memorandum describing the NPC Assets and the issuance of press releases in numerous publications stating that Allen had been retained to assist in the sale of the NPC Assets. Interested parties were also given access to substantial information regarding NPC. As a part of this marketing program, sealed bids for the NPC Assets were solicited by Allen, who established an October 29, 1985, deadline for the making of such bids. Of the bids received by Allen, the bid of Cargill was determined to be the highest and best bid. Counsel for CIOC has represented to the Court, and Atlantic Petroleum Corporation ("APC") has not denied, that APC was aware of this marketing and bidding procedure. In any event, APC did not make a bid in accordance with these procedures.

2. Extensive negotiations between NPC and Cargill after October 29, 1985, culminated in the execution on December 16, 1985, of the Agreement, pursuant to which Cargill agreed to buy and NPC agreed to sell the NPC Assets.

3. Section 5.4 of the Agreement provided that Cargill had the right to match any higher competing offer for the NPC Assets within five days of the receipt of such an offer. The Agreement also provided that

Cargill would be reimbursed for its expenses incurred in connection with the transaction if the NPC Assets were sold to a competing bidder.

4. This Court's order of December 27, 1985 (the "December 27 Order"), scheduled a hearing on January 17, 1985 (the "January 17 Hearing"), to consider the CIOC Motion and approved a notice of the January 17 Hearing proposed by CIOC (the "Notice of Hearing").

5. The December 27 Order also established service and publication requirements for the Notice of Hearing.

6. CIOC complied with these service and publication requirements by (a) serving the Notice of Hearing on or about December 27, 1985, on the official service list for these proceedings and on all creditors of CIOC and (b) publishing the Notice of Hearing on or about January 3, 1986, in The Wall Street Journal (National Edition), The New York Times (National Edition), The Boston Globe and the Florida Times/Union. CIOC has filed in these proceedings certificates of service and affidavits of publication confirming compliance with these requirements.

7. The December 27 Order also established procedures for the making of competitive bids for the NPC Assets and established a deadline of January 14, 1986, for the making of such competitive bids. CIOC did not receive any competitive bids by the January 14, 1986, deadline.

8. The December 27 Order established a deadline of January 14, 1986, for the service of objections to the CIOC Motion. No objections were made in accordance with the December 27 Order or otherwise.

9. The Notice of Hearing provided notice to all interested parties of the January 17 Hearing and of the

procedures for making competitive bids and objections.

10. At the January 17 Hearing, counsel for CIOC estimated the total purchase price of the NPC Assets under the Agreement to be $107,000,000.

11. At the January 17 Hearing, after hearing counsel for CIOC in support of the CIOC Motion and determining that no interested party desired testimony thereon, this Court solicited additional competitive bidding for the NPC Assets, such bids to be subject to the terms and conditions of the Agreement, other than price.

12. APC made a bid of $2,000,000 more than the purchase price agreed to between NPC and Cargill in the Agreement. APC specified that its bid should be considered to add $2,000,000 to that portion of the total purchase price allocated in the Agreement to the fixed assets (property, plant and equipment), rather than the current assets of NPC, thus raising the price for the fixed assets under the Agreement from $10,947,000 to $12,947,000.

13. Having objected a number of times and reserving all rights, Cargill made a further bid for the NPC Assets, as did APC. CIOC was orally authorized to sell the NPC Assets to APC in accordance with the terms of the Agreement, including a January 31, 1986, closing date, for $13,250,000 for the fixed assets, plus the price for current assets provided by the Agreement. The last bid of APC on January 17 was $53,000 in excess of the last bid made by Cargill on January 17.

14. Cargill objected and contended that (a) the bidding process was contrary to the December 27 Order and inconsistent with existing case law and (b) APC had no standing to be heard. These objections were overruled and counsel for CIOC was directed to pre-

pare an order authorizing the sale to APC based upon the last bid of APC for the NPC Assets.

15. On January 19, 1986, counsel for CIOC presented a proposed order to the Court. The Court was informed at this time by counsel for Cargill that Cargill desired to reopen the January 17 hearing.

16. The Court agreed to consider on January 27, 1986, a motion by Cargill to reopen the January 17 Hearing and did not enter an order regarding the January 17 Hearing.

17. On or about January 21, 1986, Cargill filed and served on APC and the other parties that appeared at the January 17 Hearing a motion to reopen the January 17 Hearing (the "Cargill Motion").

18. On January 27, 1986, the Court determined, after hearing counsel for Cargill, APC and CIOC, that it was in the best interest of the estate of CIOC to grant the Cargill Motion and reopen the January 17 Hearing. At this time, Cargill attempted to exercise a contractual right to match competing bids. This asserted right was denied by the Court and the Court called for further competitive bidding.

19. The Court then considered bids of Cargill and APC for the NPC Assets. Cargill's bid of $16,020,000 for NPC's property, plant and equipment was the final bid made and was higher than any bid of APC. The Court then authorized CIOC to consent to and cause the sale of the NPC Assets to Cargill for a price of $16,020,000 for the property, plant and equipment, plus the price for current assets stated in the Agreement, and subject to all other terms and conditions of the Agreement.

It is therefore ORDERED that:

1. Cargill made the highest and best offer for the NPC Assets at the January 27 hearing.

2. CIOC be, and it hereby is, authorized and empowered to cause the sale, on or about January 31, 1986, by NPC of the NPC Assets to Cargill on the terms and conditions set forth in the Agreement, provided that Cargill shall pay NPC $16,020,000 for property, plant and equipment.

3. CIOC be, and it hereby is, authorized and empowered to consent to the execution, delivery and performance by NPC of the Agreement.

4. CIOC be, and it hereby is, authorized and empowered to execute such documents and perform such other acts as may be necessary or appropriate to effectuate the sale of the NPC Assets to Cargill.

Dated: February 3, 1986
Jacksonville, Florida

/s/ George L. Proctor
GEORGE L. PROCTOR
Bankruptcy Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Bankruptcy Case Nos. 84-289-BK-J-GP
through 84-332-BK-J-GP, inclusive and
85-1033-BK-J-GP

IN RE: THE CHARTER COMPANY, *et al.*,
Debtors.

Case No. 86-244-Civ-J-12

CARGILL, INCORPORATION,
Appellant,

vs.

CHARTER INTERNATIONAL OIL COMPANY,
Appellee.

[Filed Dec. 15, 1986]

ORDER

This cause is before the Court on appeal of an order entered by the Bankruptcy Court on February 3, 1986. Said order authorized the Charter International Oil Company ("CIOC") to consent to a sale of its subsidiary Northeast Petroleum Corporation ("NPC") to Cargill, Inc., at a price which exceeded by $5,073,000 the purchase price set in a purchase and sale agreement entered into between NPC and Cargill on December 16, 1985. The increase in the purchase price resulted from com-

petitive bidding between Cargill and Atlantic Petroleum Company. In short, Cargill complains that the Bankruptcy Court improperly subjected it to competitive bidding in the purchase of NPC and, to right this wrong, Cargill suggests that CIOC be ordered to disgorge $5,073,000.

The Court has considered the lengthy briefs submitted by the parties and has entertained oral argument on the issues raised by this appeal. Upon such review, the Court has made the following determinations. First, the Court finds that the Bankruptcy Court had jurisdiction to enter the approval order. *See* 28 U.S.C. 157(b)(1), which allows a bankruptcy judge to "hear and determine all cases under Title 11 and all core proceedings arising under Title 11 . . . ."

Second, the Court does not believe that the Bankruptcy Court abused its discretion in refusing to confirm the sale of NPC to Cargill at the price set in the agreement of December 16, 1985, and instead allowing competitive bidding. To begin with, it is settled law that a "bankruptcy court's confirmation or refusal to confirm a sale only will be overturned in extreme cases if there has been an abuse of discretion." *In re Chung King, Inc.*, 753 F.2d 547, 549 (7th Cir. 1985). Furthermore, the Court finds no merit in Cargill's complaint that the Bankruptcy Judge improperly allowed Atlantic to bid against Cargill. In spite of the fact that Atlantic had not served a competitive bid upon CIOC by the date set in the scheduling order, the Court believes that by continuing the confirmation hearing for ten days, the Bankruptcy Court cured any problems arising from this procedural irregularity.

The governing principle in a confirmation hearing is to secure the highest sale price for the bankruptcy estate. *Id.* Because it is clear that the Bankruptcy Court's actions in this case were consistent with this principle, this Court will affirm the order authorizing CIOC to con-

sent to and cause the sale of NPC assets, entered on February 6, 1986. Accordingly, it is

ADJUDGED:

1. That the Bankruptcy Court's order of February 6, 1986, entitled "Order Authorizing CIOC to Consent to and Cause the Sale of NPC Assets" is hereby affirmed; and

2. That this appeal is hereby dismissed.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 12th day of December 1986.

/s/ Howell W. Milton
United States District Judge

Copies to:

Counsel of Record

Hon. George L. Proctor

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 86-3865

IN RE THE CHARTER COMPANY, *et al.*,
Debtors,

CARGILL INCORPORATED,
Plaintiff-Appellant,

ATLANTIC PETROLEUM CORPORATION,
Plaintiff,

v.

CHARTER INTERNATIONAL OIL COMPANY,
Defendant-Appellee.

Oct. 13, 1987

Appeal from the United States District Court
for the Middle District of Florida

Before HILL and VANCE, Circuit Judges, and SPELLMAN*, District Judge.

PER CURIAM:

This is an appeal from a district court ruling affirming a bankruptcy court's order approving a sale of assets

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* Honorable Eugene P. Spellman U.S. District Judge for the Southern District of Florida, sitting by designation.

by a subsidiary of a debtor corporation. We hold that the appeal is moot because the appellant failed to obtain a stay of either the approval order or the sale pending appeal.

I. FACTS

Appellee, Charter International Oil Company (CIOC), filed a petition for reorganization under Chapter 11 of the Bankruptcy Code along with approximately 40 affiliated companies in the United States Bankruptcy Court for the Middle District of Florida. No petition was filed on behalf of approximately 90 other affiliates, including Northeast Petroleum Industries, Inc. (NPI), a wholly-owned subsidiary of CIOC, and Northeast Petroleum Company (NPC), a subsidiary of NPI.

Following a sealed bidding process, appellant, Cargill, Inc., negotiated a contract with NPC for the purchase of NPC's assets for $107,803,000. As the indirect parent of NPC, CIOC sought the approval of the bankruptcy court for directing that the NPC shares be voted in favor of the sale. Cargill and NPC agreed that CIOC would seek such approval from the court. In connection with the approval process, the bankruptcy court approved a Notice of Hearing which established a deadline of January 14, 1986 for submitting better offers for filing objections to the sale. No objections or other offers were received as of that deadline.

The bankruptcy court then set a hearing date for January 17, 1986. At that hearing, Atlantic Petroleum Company (Atlantic), which is not a party to this suit, requested an extension of the January 14 bidding deadline. The court directed that Cargill and Atlantic enter into competitive bidding in open court, and Atlantic gave the highest bid. The court initially directed that Atlantic's bid be accepted, but then agreed to Cargill's request that the hearing be reopened. The hearing was reopened on January 27, and the court ordered further competitive

bidding. Cargill won this final round of bidding with a price over $5 million higher than the price in the original NPC-Cargill contract. The bankruptcy court approved CIOC's consent to the sale at that price, and Cargill bought the assets. Cargill then appealed the approval order to the district court. The district court affirmed the order, and Cargill appeals.

II. DISCUSSION

Appellant challenges both the propriety of the bankruptcy court's actions and its authority to act at all with regard to the sale of property that is not part of the bankruptcy estate. Appellee contends that the bankruptcy court's actions were within its discretion. We do not reach these issues because we find that the appeal is moot.[1]

In order to protect those who purchase property from a bankrupt estate, the Bankruptcy Code provides that once a sale is approved by the bankruptcy court and consummated by the parties, the bankruptcy court's authorization of the sale cannot be effectively altered on appeal. Section 363(m) of the Code states:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not effect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authoriza-

[1] While we do not reach the issue of whether the bankruptcy court's actions were valid, we note that reopening the bidding after the lowest bidder has spent considerable time and money negotiating a contract could chill future interest in purchasing bankruptcy estate property. *See e.g., In re Northern Star Industries, Inc.*, 38 B.R. 1019, 1022 (E.D.N.Y. 1984). This undesirable result should be risked only after carefully weighing the benefits to the estate in question against the potential harm to other estates.

> tion and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Because this provision prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot. *See In re Bleaufontaine*, 634 F.2d 1383, 1389-90 (5th Cir. Unit B Jan. 1981); *In re Vetter Corp.*, 724 F.2d 52, 55-56 (7th Cir. 1983).

Appellant failed to obtain a stay as required under section 363(m). The bankruptcy court's approval was issued, the assets were transferred, and the sale was completed. Thus, under section 363(m), the validity of the sale cannot be altered on appeal. This renders the appeal in this court, as well as the initial appeal to the district court, moot.

While the bankruptcy court did not explicitly state that the authorization was pursuant to section 363, there is no other provision under which the court could have been acting. Indeed, appellant argues that the bankruptcy court treated the approval as one for a sale of bankruptcy estate property. Thus, whether or not the approval was appropriately characterized as an authorization under section 363, it is clear that it was treated as such. This is all that is needed in order to trigger the stay requirement. *See In re Sax*, 796 F.2d 994, 997-98 (7th Cir. 1986).

Appellant raises two objections to the conclusion that its failure to obtain a stay as required by section 363(m) renders the appeal moot. First, appellant argues that the stay requirement does not apply to a purchaser who challenges the authorization. This argument is without merit. There is nothing in the language of section 363(m) to suggest that such an exception exists. Rather, the language states a flat rule governing all appeals of section 363 authorizations.

Appellant's second objection is that it does not seek to affect the validity of the sale, but only to obtain a refund of a portion of the sale price. This objection also fails. One cannot challenge the validity of a central element of a purchase, the sale price, without challenging the validity of the sale itself. We fail to see how this court could order a $5 million refund to the purchaser without affecting the validity of the sale.

For the foregoing reasons, the appeal is DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3865

D.C. Docket No. 86-244-12

IN RE: THE CHARTER COMPANY, *et al.*,
Debtors.

CARGILL, INCORPORATED,
Plaintiff-Appellant,

ATLANTIC PETROLEUM CORPORATION,
Plaintiff,

versus

CHARTER INTERNATIONAL OIL COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before HILL and VANCE, Circuit Judges, and SPELLMAN*, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

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* Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be and the same is hereby, DISMISSED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 13, 1987

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ [Illegible]
Deputy Clerk

Issued as Mandate: Dec. 9, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3865

IN RE: THE CHARTER COMPANY, *et al.*,
Debtors.

CARGILL INCORPORATED,
Plaintiff-Appellant,

ATLANTIC PETROLEUM CORPORATION,
Plaintiff,

versus

CHARTER INTERNATIONAL OIL COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(Opinion October 13, 1987, 11 Cir., 198-, —— F.2d ——).
(November 24, 1987)

Before HILL and VANCE, Circuit Judges, and
SPELLMAN*, District Judge

---

* Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 102

(1) "after notice and a hearing", or a similar phrase—

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if—

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorized such act;

* * * *

§ 363

* * * *

(b) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

* * * *

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

§ 1109

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a

case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b)(1) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2629.

(2)

Supreme Court, U.S.
FILED
MAR 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1401

In The

Supreme Court of the United States

October Term, 1987

CARGILL, INCORPORATED,

Petitioner,

v.

CHARTER INTERNATIONAL OIL COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the issues presented on appeal to the Eleventh Circuit were moot because Cargill failed to obtain a stay pending appeal.

2. Whether the Bankruptcy Court had authority to conduct the January 17 Hearing, receive bids and approve the sale of the NPC Assets.

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STATUTES INVOLVED

Bankruptcy Reform Act of 1978, Sections 102(1), 363(b) and 363(m). The pertinent text of the statutes involved is set forth on page 22 of the Appendix to Cargill's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On April 20, 1984 (the "Petition Date"), Charter International Oil Company ("CIOC"),[1] Northeast Petroleum Company's ("NPC") ultimate shareholder, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code (the "Code") and continued the operation of its business as debtor in possession pursuant to §§1107 and 1108 of the Code.

On December 16, 1985, NPC and Cargill, Inc. executed an agreement (the "Contract") by which NPC agreed to sell substantially all of its assets (the "NPC Assets") to Cargill. By §§7.6 and 8.5 of the Contract, NPC and Cargill agreed that (i) the consent of CIOC was required for this sale, and, therefore, (ii) Bankruptcy Court approval in CIOC's Chapter 11 proceedings was required.

Pursuant to these contractual requirements, CIOC filed a motion (the "CIOC Motion") seeking Bankruptcy Court approval "to consent to and cause the sale" of the

---

[1] A list of CIOC's shareholder, subsidiaries (except wholly owned subsidiaries) and affiliates is attached as Exhibit A.

NPC Assets and to schedule a hearing date. The Bankruptcy Court entered an order (the "Scheduling Order") scheduling a hearing on the CIOC Motion for January 17, 1986 (the "January 17 Hearing"). As required by the Scheduling Order, CIOC timely served the CIOC Motion, the Scheduling Order and the related notice of hearing (the "Notice of Hearing") to all interested parties.

The Scheduling Order established procedures for third parties to make competitive bids for the relief sought in the CIOC Motion and established a deadline of January 14, 1986 for making such bids. CIOC did not receive any bids by this deadline. Cargill was aware that the Contract, the Scheduling Order and the Notice of Hearing expressly contemplated competitive bids.

At the January 17 Hearing, the Bankruptcy Court found that it was in the best interest of CIOC's estate for CIOC to consent to and cause the sale of the NPC Assets. The Bankruptcy Court then vacated that part of the Scheduling Order which set a deadline of January 14 for making competitive bids and solicited oral competitive bids in open court.

Cargill, under protest, and Atlantic Petroleum Corporation ("Atlantic") made bids. Atlantic bid the highest, $2,303,000 more than the Contract price (the "Contract Price"). Counsel for CIOC was directed to prepare an order authorizing a sale to Atlantic.

On January 21, 1986, before the entry of an order regarding the January 17 Hearing, Cargill filed a motion to reopen the January 17 Hearing (the "Cargill Motion") on the grounds that Cargill was surprised and

prejudiced by the Bankruptcy Court's acceptance of bids after the deadline set forth in the Scheduling Order.

On January 27, 1986, a hearing was held on the Cargill Motion (the "January 27 Hearing"). CIOC supported the Cargill Motion to preclude any argument that Cargill had been prejudiced (by being unprepared for bidding) at the January 17 Hearing. The Bankruptcy Court granted the Cargill Motion at the January 27 Hearing and called for further competitive bidding. After extensive bidding, Cargill bid the highest, $5,073,000 more than the Contract Price and $2,770,000 more than Atlantic bid at the January 17 Hearing. The Bankruptcy Court authorized a sale to Cargill and counsel for CIOC was directed to prepare an appropriate order.

On February 3, 1986, the Court entered an order authorizing CIOC to "consent to and cause" the sale of the NPC Assets to Cargill (the "Approval Order"). Three days later, on February 6, 1986, Cargill purchased the NPC Assets, paying to NPC the entire price Cargill bid for the NPC Assets, $112,876,000.

Subsequently, Atlantic appealed the Approval Order. Cargill cross-appealed the Approval Order, contending that it should be required to pay only the Contract Price rather than the higher amount it voluntarily bid for the NPC Assets. Atlantic subsequently dismissed its appeal, but Cargill did not dismiss its cross-appeal.

On December 12, 1986, the United States District Court for the Middle District of Florida entered an

order affirming the Approval Order and dismissing Cargill's appeal on the basis that (i) the proceedings were "core proceedings" and (ii) the Bankruptcy Court did not abuse its discretion by refusing to confirm the sale at the Contract Price and allowing competitive bidding.

On December 18, 1986, CIOC's plan of reorganization (the "CIOC Plan") was confirmed by the Bankruptcy Court. On March 31, 1987, the CIOC Plan was consummated and CIOC made its final distribution to its creditors. The proceeds of the sale of the NPC Assets constitute a material portion of the cash CIOC distributed to its creditors pursuant to the CIOC Plan. Without such proceeds the CIOC Plan would not have been feasible.

Cargill subsequently appealed the decision of the District Court and on October 13, 1987, the United States Court of Appeals for the Eleventh Circuit dismissed the appeal on the grounds that the issues presented were moot under §363(m) of the Code.

SUMMARY OF ARGUMENT

The decision of the Eleventh Circuit affirming the District Court's dismissal of this action is not of special importance to the public and is not in conflict with any decision of this Court or the various Courts of Appeal.

Furthermore, the Eleventh Circuit correctly held the appeal moot under §363(m) of the Code because the

relief Cargill is seeking would require the upset of a sale which Cargill failed to stay pending appeal.

Even if the issues were not moot, the Bankruptcy Court had the authority to conduct the January 17 Hearing because the parties, pursuant to the Contract, expressly conditioned the sale of the NPC Assets on Bankruptcy Court approval.

ARGUMENT

I. The issues presented on appeal to the Eleventh Circuit were moot because Cargill failed to obtain a stay pending appeal.

Section 363(m) of the Code eliminates judicial relief on an appeal from an order authorizing the sale of property under §363(b) of the Code when the sale was not stayed pending appeal.[2]

Courts have uniformly held that all issues relating to the sale of a debtor's property under §363(b) are moot if the sale is not stayed pending appeal. *See In re*

---

[2] Section 363(m) states:

> The reversal or modification of an appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Sax, 796 F.2d 994 (7th Cir. 1986); *In re Abbotts Dairies of Pennsylvania*, 788 F.2d 143 (3rd Cir. 1986); *In re Exennium*, 715 F.2d 1401 (9th Cir. 1983).

The issues presented by Cargill on appeal were moot because the sale of the NPC Assets is controlled by §363(m). No section other than §363(b) could have been arguably used to accomplish Cargill and CIOC's requirement of Bankruptcy Court approval of the sale. *See In re Sax*, 796 F.2d at 997-8. Furthermore, it is not disputed that Cargill is a good faith purchaser and that it did not obtain a stay of the sale pending appeal. Accordingly, this proceeding fits squarely within the language of §363(m).

Cargill is essentially asking this Court to create an exception to §363(m) which would allow *a purchaser* to appeal an order authorizing a sale without obtaining a stay (that is, to pay the price, take possession of the asset, and then appeal that part of the deal he did not like). There is no basis to do so, however, because §363(m) by its express terms governs all §363(b) authorizations, and nothing in the statute, legislative history, or case law creates or even suggests any exceptions to §363(m). Indeed, because of the policy of finality of orders of the Bankruptcy Court, courts have refused to create exceptions to §363(m).

> The courts should follow statutory provisions precisely; to look for exceptions would increase litigation, which would seriously undermine the finality and certainty imposed by §363(m).
>
> *In re Sax*, 796 F.2d at 998.

Furthermore, the "practical necessities involved in a successful reorganization" require that unless an order of a bankruptcy court is stayed pending appeal, the debtor's acts in accordance with that order should not be subject to reversal. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 189 (9th Cir. 1977). To reverse the Approval Order and require CIOC to return $5,073,000 of the purchase price to Cargill almost one year after consummation of CIOC's plan of reorganization would not only be contrary to the policy of finality but would be disruptive to CIOC's reorganization. Such result would be especially troublesome because Cargill, by paying fair market value for the NPC Assets, has suffered no harm. Cargill was well aware of the bidding process in the Bankruptcy Court. At the January 17 Hearing the Court stated:

> [e]veryone in the world knew we were coming to this hearing to deal with this matter this morning, just as we are dealing with it.
>
> ***
>
> . . . anyone who comes in this courtroom knows that the Court deals with these matters at a public hearing and lets it go to the highest and best bidder.
>
> January 17 Hearing,
> Transcript R.3-24, 25.

Cargill responded:

> . . . that's basically how we were lead to believe that this hearing would be conducted . . .
>
> January 17 Hearing,
> Transcript R.3-25.

Furthermore, any prejudice Cargill may have suffered by not being prepared to bid at the January 17 Hearing was cured by the Court's order reopening the bidding at the January 27 Hearing at Cargill's request.

In its Petition for Writ of Certiorari (the "Petition"), Cargill argued that §363(m) is not applicable because Cargill is not seeking to modify or reverse the Approval Order but rather seeks "damages" as a result of the Bankruptcy Court entertaining bids at the January 17 Hearing. This argument is without merit and was properly dismissed by the Eleventh Circuit on the grounds that the appeal *is from the Approval Order*; it necessarily effects the validity of the sale, and the Court could not "order" the return of the $5,073,000 to Cargill without modifying or reversing the Approval Order.

Cargill further argued that by executing the Contract, it gained a contractual interest in the NPC Assets. This argument ignores the express provisions of the Contract by which *Cargill* required Bankruptcy Court approval as a condition to its obligations under the Contract:

> The obligations of Purchaser under this Agreement shall be subject to the satisfaction, on or prior to the Closing Date, of all of the following conditions . . .
>
> ***
>
> 7.6 *Approval of Bankruptcy Court.* Seller shall have given timely notice of the application for the Approval Order and the hearing thereon in a manner in which, and to each person and entity to whom, it is required by the Bankruptcy Code, 11 U.S.C. Section 101 *et. seq.*, to give such notice. At

> least fourteen (14) calendar days prior to the Closing Date, the Bankruptcy Court shall have entered an Approval Order in the Reorganization Proceedings with respect to this Agreement, and no stay of such Approval Order shall have been entered as of the Closing Date.
>
> Section 7.6 of Contract;
> *See also*, Section 8.5
> of Contract.
>
> 1.4 *Approval Order*. "Approval Order" with respect to an agreement *means a final order of the Bankruptcy Court pursuant to the Reorganization Proceedings [CIOC's] authorizing the sale of the Acquired Assets and otherwise approving the execution, delivery and performance by Seller of this Agreement.*
>
> Section 1.4 of Contract
> (emphasis added).

Accordingly, Cargill did not acquire a contractual interest in the NPC Assets until the Bankruptcy Court entered the Approval Order on February 3, 1986.

Cargill argues that this Appeal is of special importance because the decision of the Eleventh Circuit would allow bankruptcy judges to insulate their §363(b) orders from review by Article III courts by refusing to grant a stay pending appeal. This argument ignores Bankruptcy Rule 8005 which enables a district court to grant a stay pending appeal of a bankruptcy court's order (Cargill sought no such stay). Accordingly, the Eleventh Circuit's decision does not insulate §363(b) sales from appellate review. Appellate review of bankruptcy court decisions, just like appellate review of district court decisions, is available, *but only when the*

proper procedures are followed. See In re Sax, 796 F.2d at 999.

Cargill further argues that a properly justiciable issue remains in the Bankruptcy Court because Cargill has filed a proof of claim (the "Claim") in CIOC's Chapter 11 case for alleged damages for unjust enrichment of CIOC's estate because the Bankruptcy Court received bids at the January 17 Hearing. As Cargill admits in pleadings relating to the Claim, the Claim creates no independent justiciable issue but is directly related to, and dependent on, the outcome of Cargill's appellate effort:

> During the pendency of this appeal, [the Bankruptcy Court] *lacks jurisdiction* to determine the Debtors' liability on the Class 2 claim of Cargill because the *basis for that claim is precisely the subject matter of that appeal.*
>
> ***
>
> The appeal of the case *underlying the Claim* pends before the Eleventh Circuit.
>
> Answer of Cargill to Objections by Debtors to Certain Disputed Claims, pages 2 and 3 (emphasis added).

Debtors' liability for the debt alleged in the Claim cannot be determined until disposal of Cargill's appeal by the Eleventh Circuit.

> Motion of Cargill to Stay Proceedings Concerning the Objections of Debtors' to the Allowance of the Administrative

Claim Filed by Cargill, Inc., page 2.

Nowhere in any of the pleadings filed by Cargill relating to the Claim does Cargill make a claim for "damages" suffered through unjust enrichment of CIOC. To the contrary, the Claim was filed for the sole purpose of preserving a claim in CIOC's Chapter 11 case should Cargill win on appeal. Once the appeal is resolved, no justiciable issue will remain. Furthermore, if Cargill's argument is accepted, it would allow an appellant who has not sought or obtained a stay pending appeal to circumvent §363(m) merely by filing a proof of claim.

Cargill's argument that the decision below conflicts with this Court's decision in *Bank of Marin v. England*, 87 S.Ct. 274 (1966), the Ninth Circuit's decision in *Matter of Combined Metals Reduction Co.*, *supra*, and the District of Columbia's decision in *In re AOV Industries*, 792 F.2d 1140 (D.C. Cir. 1986) is incorrect. None of these decisions held that §363(m) allows a purchaser to appeal a §363(b) sale without obtaining a stay of that sale. *Bank of Marin* does not involve a sale of property or even mention §363(m). *AOV Industries* and *Combined Metals* actually support CIOC's position. In each case, the Court held that the issues relating to the appeal of a §363(b) sale are directly controlled by §363(m) and therefore the appellant's failure to obtain a stay rendered all issues involving the sale moot. In each case, the only issues which were not moot were those issues relating to the confirmation order which are not directly controlled by §363(m).

Cargill has failed to cite any appellate decision reversing an order of a bankruptcy court authorizing a

sale that was not stayed pending appeal. Cargill's reliance on *Matter of Chung King*, 753 F.2d 547 (7th Cir. 1985), is misplaced. In *Chung King*, the court did not rely on or even mention §363(m) because it was not applicable. The appeal was not from an order authorizing a §363(b) sale, but rather from an order vacating a confirmed sale.

After the Approval Order was entered by the Bankruptcy Court, Cargill nevertheless went ahead and purchased the NPC Assets, voluntarily paid the money it now seeks to recover, and further sat by while that money was ultimately distributed to CIOC's creditors–all without ever seeking a stay from any court. Although perhaps a source of embarrassment for Cargill, this is not a matter of great public importance, and it is moot.

II. The Bankruptcy Court had authority to conduct the January 17 Hearing, receive bids and approve the sale of the NPC Assets.

Cargill argues in its Petition that §102(1)(b) of the Code absolutely precluded the Bankruptcy Court from holding the January 17 Hearing and entering the Approval Order because no objections to the sale were filed. This argument is contrary to the language of the statute, its legislative history and the written agreement of CIOC and Cargill.

By its express terms, §102(1)(a) permits a bankruptcy court to conduct a hearing when the court determines that it is "*appropriate in the particular circumstances*".

> [The] decision with regard to appropriateness must be made on a case by case basis by the bankruptcy court applying its expertise in the context of the individual circumstances of the case.
>
> 2 *Collier on Bankruptcy*, 102.02 at 102-5 (15th ed. 1986).

Here, the bankruptcy judge determined that court approval of the sale of the NPC Assets was appropriate because he was well aware that the proceeds of the sale would constitute a material portion of the cash distributed to CIOC's creditors.

> However, I think that I would like to give anyone an opportunity who wishes to speak on behalf of or against the motion, *because it does enjoy a particular important place in this case.*
>
> January 17 Hearing, Transcript R.3-16 (emphasis added).

It's hard to imagine that it would *not* be "appropriate" for the Bankruptcy Court to approve a debtor's required consent to the sale of a subsidiary's assets for more than $112 million.

Furthermore, the legislative history of §102 demonstrates that the absence of an objection does not prevent a bankruptcy court from conducting a hearing and approving a sale when it determines that such approval is appropriate.

> The phrase "such opportunity for a hearing as is appropriate in the particular circumstances" is *designed to permit the Rules and the courts to expedite or dispense with hearings when speed is essential.*

> H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 315 (1977); S Rep. No. 95-989, 95th Cong., 2nd Sess. 27 (1978) (emphasis added).

> [If] appropriate notice is given and no party to whom such notice is sent timely requests a hearing, then the act sought to be taken *may be taken* without an actual hearing.
>
> 124 Cong. Rec. H 11,090 (Sept. 28, 1978); 124 Cong. Rec. S 17,407, (Oct. 6, 1978) (emphasis added).

Cargill cites no statute, legislative history or case law which states that a bankruptcy court *must* refrain from conducting a hearing when no objections are filed. Moreover, it is well-settled that there is

> . . . nothing in the statutes of the Bankruptcy Code, its legislative history, or case law, indicating that the Court should acquiesce to a proposal that estate property be sold at a price vastly beneath its appraised market value.
>
> *In re Cossett*, 51 B.R. 166, 168 (Bankr. S.D. Ohio W.D. 1985).

If the Bankruptcy Court is deprived of its authority to refuse to confirm a sale, there is no guard against property being sold at a price "vastly beneath its fair market value." The Bankruptcy Court would be required to confirm every sale, which was not objected to, regardless of whether the debtor received fair value. Such result directly contradicts the governing principle

of any bankruptcy proceeding, which is to secure the highest price for the bankrupt's estate and to protect the interest of the creditors. *Matter of Chung King*, 753 F.2d at 547.

Perhaps most significantly, Cargill ignores the undisputed fact that *Cargill required* CIOC's Bankruptcy Court approval as a condition to Cargill's performance under the Contract. Although §102(1) of the Code authorizes a sale of the Debtors' property without bankruptcy court approval upon notice if no objections are filed, it is not, and cannot be error for a bankruptcy court to have a hearing, entertain bids and approve a sale where expressly contemplated by contract.

> Court approval is not necessary in the absence of an objection unless *the terms of sale, as in the sale presently before the court, require approval of the court.*
>
> *In re Governor's Island*, 45 B.R. 247, 254 (Bankr. E.D. N.C. 1984) (emphasis added).

Finally, Cargill argues that the Bankruptcy Court should not have received bids at the January 17 Hearing because its role was limited to the approval or disapproval of the Approval Order. This argument not only ignores the Contract requirement for Bankruptcy Court approval but also contradicts the well established rule that a bankruptcy court may receive higher bids at a hearing involving the sale of property in order to maximize the assets available for the creditors. *See Matter of Chung King, supra*; *In re Abbotts Dairies of Pennsylvania, supra.*

CONCLUSION

Based on the foregoing, CIOC respectfully requests this Court to deny Cargill's Petition for a Writ of Certiorari. In any event, the relief sought by Cargill cannot be granted. If the Bankruptcy Court erred in not authorizing the sale of the NPC Assets to Cargill at the Contract Price, the proper relief on appeal is not to award Cargill monetary damages but rather to vacate the Approval Order.

Respectfully submitted,

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EXHIBIT A

CHARTER INTERNATIONAL OIL COMPANY'S
SHAREHOLDER
AFFILIATES AND SUBSIDIARIES
(excluding wholly owned subsidiaries)

Charter Oil Company
Acorn Investment Company
Bulletin Company
American Independent Distributors, Inc.
Charter Publishing Company
Mason/Charter Publishers, Inc.
Charter Media Company
San Francisco Broadcasters, Inc.
The Charter Guild, Inc.
Chartcom, Inc.
KSLQ, Inc.
San Diego Broadcasters, Inc.
St. Francis Ltd.
WMIL, Inc.
WMJX, Inc.
Charmac, Inc.
Charter Facilities, Inc.
Charter Northshore Company
Charter Capital Corporation
Charter International Reinsurance Company B.V. (i.l.)
Charter Reinsurance B.V.
Charter Reinsurance Nederland B.V.
Charter International Finance N.V.
COFI Credit Corporation
Dayton Press, Inc.
St. Johns Advisory Company
St. Johns Realty Investors
Timber Purchase Company
Grande Alliance Co. Ltd.
Acorn Trading Company
Alaska Oil Company, Inc.
Charter Oil (U.K.) Limited
Charter Futures Trading Company
Charter Oil (UK Trading) Limited
Charter Oil (Alaska), Inc.

Alaska Oil Company
Acorn Pipe Line Company
Acorn Properties, Inc.
Charter Caribbean Company
Charter Hospital, Inc.
The Charter Company
Prospect Company, Ltd.
New CORAL Ltd.
Cayman Overseas Reinsurance Association Ltd.
New Providence Assurance Company Limited
Bahamas Underwriters Services Limited
St. Ives Company Ltd.
Charter Crude Oil Company
Charter Dental Hospital, Inc.
Grove Oil Overseas Services Limited
Lybert Petroleum Limited
Charter (Iran) Petroleum Company
Charter Aquaculture (Ireland) Limited
Charter Colorado Resources Company
Charter Hotels (Jersey) Limited
Charter Marketing Company
Mr. B's Oil Co., Inc.
Mr. B's Food Mart, Inc.
Miss Company
Charter Oil Abu Dhabi Corporation
Charter Oil (International), Inc.
Charter Oil Services, Inc.
Charter Stevedoring Company
Charter Venezuela Petroleum Company
Grove Oil Limited
Independent Petrochemical Corporation
Luqa, Inc.
MTC Terminal Company
Multi Mineral Corporation
COFI Credit Corporation
COFI Credit (Massachusetts), Inc.
Antilles Oil Company, Inc.
Caloil Inc.
Charter Crude Oil Trading Company
Charter Oil Eastern Corporation
Charter Oil Eastern Production, Inc.

Charter Oil (Overseas) Limited, Inc.
Bahamas Oil Refining Company
Borco Towing Company Limited
Grand Bahamas Petroleum Company Limited
Charter Oil Specialties Limited
Borco Desulfurization Company
Borco Marine Company
Freeport Trading Co. Limited
Marine Agents and Brokers Limited
NEPCO INC.
Nepco (Florida), Inc.
Nepco Exploration (U.K.) Limited
Vatra Fuels, Ltd.
North American Oil Traders Limited
Nepco Petroleum Limited
Nepco Petroleum (U.K.) Limited
New England Petroleum Corporation
Nepco Energy Corporation
Oswego Barge Corporation
Charter Advisory Company
Charter International Development Company
Charter Leasing Company
Preferred Oil Company, Inc.
Quebec Oil Refinery, Ltd.
Senex Company Limited
World-Wide Petroleum Products Limited
Nepco Trading Company
Charter Oil (Bahamas), Inc.
Charter Oil (Bahamas) Limited
Valdez Oil Inc.
Ronald P. Webb
Miss Holding Co.

Supreme Court, U.S.
FILED
APR 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARGILL, INCORPORATED,
Petitioner,
v.
CHARTER INTERNATIONAL OIL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh District

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its petition here, Cargill noted the parallel issues now arising in appellate decisions interpreting § 363(m) and § 364(e) of the Bankruptcy Code, and cited *Unsecured Creditors' Comm. v. First Nat'l Bank & Trust Co. (In re Ellingsen Maclean Oil Co.)*, 834 F.2d 599 (6th Cir. 1987), *re'hg denied* (January 15, 1988). Pet. at 8, n.4. We are now advised that the Unsecured Creditors' Committee for Ellingsen McLean Oil Co. will file a petition for certiorari in that case in this Court on or about April 15, 1988. Cargill respectfully suggests that this Court consider both petitions simultaneously, grant certiorari in both cases and consolidate the two cases

for the purpose of argument. Such treatment would eliminate the conflicts and increasing confusion in decisions interpreting §§ 363(m) and 364(e) of the Bankruptcy Code.

Several points made in the Brief in Opposition require clarification and response.

I

Corrections of Factual Statements By the Respondent.

The respondent asserts that on January 17, 1986 the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division (the "bankruptcy court") "vacated" the part of its Scheduling Order that set January 14, 1986 as the final date for the submission of competitive offers to CIOC. No citation to the record accompanies this assertion because the bankruptcy court took no such action. The bankruptcy court simply ignored the Scheduling Order, which it had entered on December 27, 1985, and which incorporated the appropriate procedures under § 363(b) upon which Cargill relied. The bankruptcy court also ignored the fact that competitive offers were to be submitted to CIOC. Only CIOC could evaluate whether it was wise to enter into ongoing business relations with any competing offeror, particularly one which had declined to participate in the earlier orderly bidding procedures conducted for CIOC and had failed to submit evidence of its financial status as required of any competitive offeror in the Scheduling Order.

CIOC also has edited remarks of Cargill's counsel from the January 17, 1986 transcript in a misleading manner. CIOC Br. at 7. Because this transcript is not now before this Court, the context of that exchange is supplied here:

> Mr. Heiman: Your Honor, may I have just one more second of your time? Because we—again, I apologize, we did not understand the procedure today. We are not in a position to respond to that

bid, because we understood the procedure to be that competitive bidding would be closed on January 14—

The Court: Well, I don't know where you got that idea, because anyone who comes in this courtroom knows that the Court deals with these matters at a public hearing and lets it go to the highest and best bidder.

Mr. Heiman: Well, we have been dealing with the Debtor and its counsel for months now, Your Honor, and that's basically how we were led to believe that this hearing would be conducted, and no competitive bids were submitted in writing as required by the order.

January 17, 1986 hearing transcript, R.3-25, 26.

II

Interpretations of § 363(m) in the Seventh, Ninth and Eleventh Circuits Are Inconsistent and Demonstrate the Need for this Court to Focus on the Purpose of § 363(m) and Its Practical Application.

None of the cases cited by the respondent in support of the decision below involved an actual good faith purchaser seeking correction of a bankruptcy court's plainly improper auction. The "uniformity" which CIOC reads into these cases is nonexistent. *In re Sax*, 796 F.2d 994 (7th Cir. 1986), plainly leaves open for future determination and possible appeal the allocation of the proceeds of the disputed property. Because Cargill seeks recognition of its right to the Excess Purchase Price, the relief sought by Cargill is not inconsistent with *Sax*. *Sax* did not question or overrule *In re Chung King, Inc.*, 753 F.2d 543 (7th Cir. 1985), in which the successful purchaser was granted precisely the relief sought by Cargill.[1] A court which is bound by the precedent of

[1] The respondent's statement that *Chung King* was an appeal from an order vacating a confirmed sale demonstrates its unwillingness to recognize the fundamental changes in sales of bankruptcy estate assets under the Bankruptcy Code. Under the Code, there is no provision for orders confirming sales when no competitive offer

Sax has noted, "The policies underlying section 363(m) are *practicality* and finality." *Weinstein v. Greer (In re Pentell)*, 1987 U.S. Dist. Lexis 8610 (N.D.Ill. 1987) (emphasis added). It is not practical to require a good faith purchaser who responds to an improper, *sua sponte*, auction by the bankruptcy court to stay the sale to itself in order to preserve its contractual rights. *Sax* does not support this feckless requirement.

Similarly, *In re Abbotts Dairies*, 788 F.2d 143 (3rd Cir. 1986), which allowed relief to a creditor appealing an unstayed, executed transfer, citing, *inter alia*, *Mills v. Green*, 159 U.S. 651 (1895), is not compelling authority supporting the decision below. See 788 F.2d at 150, n.6. Finally, the convoluted facts in *In re Exennium*, 715 F.2d 1401 (9th Cir. 1983), did not involve an unauthorized bankruptcy court auction nor an appeal by a good faith purchaser forced to participate in such an auction in order to preserve its rights. The respondent ignores the more recent Ninth Circuit discussion of § 363(m) in *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985): "The rule that failure to obtain a stay pending appeal renders the issue moot did not originate with the Bankruptcy Rules. Rather it is a judicial doctrine which developed from the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot." Pet. 7.

The apparent internal inconsistency evident in the decisions of the Seventh and Ninth Circuits is also present in the decisions of the court below. See *Markstein v. Massey Assocs, Ltd.*, 763 F.2d 1325 (11th Cir. 1985). The inconsistencies in the interpretation of § 363(m) in the Seventh, Ninth and Eleventh Circuits demonstrate the need for this Court to give guidance on the central

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was submitted. *See, generally*, Novellino, *After Notice and Hearing*, 55 Am. Bankr. L.J. 293 (1981). The facts in *Chung King* parallel the facts in this case more closely than any other reported decision.

issue of whether § 363(m) overruled *Mills v. Green*, 159 U.S. 651 (1895), and *Bank of Marin v. England*, 385 U.S. 99 (1966).

Cargill is not "asking this Court to create an exception to § 363(m) which would allow a purchaser to appeal an order authorizing a sale without obtaining a stay." Br. in Opp. 6. On the contrary, Cargill is asking this Court to restore rationality and long standing precedent to the interpretation of § 363(m), a provision intended to protect good faith purchasers, rather than to deprive them of effective appellate relief when bankruptcy courts fail to observe the limitations on their role under the provisions of the Bankruptcy Code.

III

Cargill's Assertion of an Administrative Claim and Pursuit of Its Appeal Are the Appropriate Procedures to Obtain Relief from the Bankruptcy Court's Mishandling of the Sale of the NPC Assets.

The respondent's reference to the "practical necessities involved in a successful reorganization," and the suggestion that the consummation of its plan of reorganization supports the decision below, are disingenuous. Typically in large reorganization cases, administration of disputed claims continues for a significant time after confirmation and consummation. Particularly when the reorganized debtor had committed in its plan of reorganization to pay administrative claims as they mature or are allowed—as CIOC did in its plan of reorganization—there is no negative impact on other creditors.

IV

The Provision for an Approval Order in the Contract Did not Provide an Appropriate Basis for the Bankruptcy Court to Hold the January 17 Hearing When No Objections to the CIOC Motion Had Been Filed and No Timely Offers Submitted.

The NPC-Cargill Contract contained a condition precedent that the Court "shall have entered an Approval

Order . . . with respect to this Agreement." Section 8.5 of the Contract, R1-3-1, Exhibit C. However, the Contract did not specify the form of the "Approval Order." Assuming that no party in interest objected to the proposed sale, the Bankruptcy Code does not authorize the entry of a bankruptcy court order addressing the actions of a debtor in possession taken pursuant to 11 U.S.C. § 363(b). The respondent argues that the bankruptcy court could enter an order if the terms of the sale agreement required such an order. The parties cannot by their contract create jurisdiction in the bankruptcy court to render an advisory opinion. *In re Robert L. Hallamore Corp.*, 40 Bankr. 181 (Bankr. D. Mass 1984), and *In re Murchison*, 54 Bankr. 721 (Bankr. N.D. Tex. 1985).

The Bankruptcy Court for the Middle District of Florida recognizes this in its local rules, though not in its actions. The current Local Rules of Bankruptcy for the Middle District of Florida, the Court whose acts are the subject of Cargill's petition, state clearly the method to be used to establish that all appropriate bankruptcy procedures have been followed when no interested party objects to a § 363(b) motion. Local Rule 205(b) and (c) states:

> (b) No Court Order shall be entered approving the terms and conditions of any sale. However, in the event that a timely objection is filed, the Court shall hold a hearing at which time it will overrule or sustain the objection to the sale as may be appropriate.
>
> (c) The requirement of a "notice and hearing" contained in Bankruptcy Code § 363(b) shall have been satisfied if no request for hearing has been made after service of notice as provided for above or. if such objection has been filed, an appropriate Court order has been entered. Evidence that this has been done shall be sufficient in the form of a certified copy of the notice of sale as filed with the

> Bankruptcy Court and served on creditors, together with a certified copy of the Bankruptcy Court's docket sheet reflecting that no objection to sale or request for hearing had been made pursuant to the notice or, if such hearing was held, a certified copy of any Court order entered after request for hearing.

Local Rules, United States Bankruptcy Court, Middle District of Florida, Rule 205(b) and (c), p. 2-5 (effective Date: January 1, 1987).[2] The provisions in Sections 7.6 and 8.5 of the Contract requiring an "Approval Order" were capable of being met on January 15, 1986 by compiling the documents identified in Local Rule 205(c).

CONCLUSION

Nearly ten years after the passage of the Bankruptcy Code, many bankruptcy courts are still unaware that under § 363(b), the bankruptcy court has no role if parties in interest raise no objection. The overly broad interpretation of § 363(m) exacerbates the problem because substantive appellate review of cases such as the decision below is being denied by sometimes overbroad application of § 363(m). This case and the petition for certiorari by the Unsecured Creditors' Committee of Ellingsen MacLean Oil Co. provide this Court the opportunity to give needed clarification of the appellate rights of parties effected by transactions under §§ 363 and 364, two of the most central provisions of the Bankruptcy Code.

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[2] The fact that Local Rule 205 had not been adopted in January 1986 is not relevant because that rule simply clarifies the appropriate interpretation and implementation of § 363(b) of the Bankruptcy Code.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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